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Representative democracy and the “spirit of resistance” from Constant to Tocqueville

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Abstract:

The role of resistance in the politics of modern representative democracies is historically contested, and remains far from clear. This article seeks to explore historical thinking on this subject through a discussion of what Benjamin Constant and Alexis de Tocqueville had to say about resistance and its relationship to “representative government” and democracy. Neither thinker is usually seen as a significant contributor to “resistance theory” as this category is conventionally understood. But, in addition to their more familiar preoccupations with securing limitations on the exercise of political authority and averting majority tyranny, both thinkers wrote extensively on the nature and meanings of resistance in “representative governments” or democratic societies. Both thinkers are examined in the context of revolutionary and Napoleonic discussions about the legitimacy of resistance or “right to resist” oppression, and against eighteenth-century discussions of the “spirit of resistance” since Montesquieu. The article notes conceptual distinctions between resistance, revolution and insurrection in the period, and addresses the broader question of the extent to which early nineteenth-century French liberals sought to “institutionalise” principles of resistance within modern constitutional frameworks.

Keywords:

resistance; insurrection; revolution; liberalism; democracy; representative government; modern republicanism; Benjamin Constant; Alexis de Tocqueville

1. Introduction

What is the role of resistance in the politics of modern representative democracies? The answer to this question seems more complicated than perhaps it initially appears. At first glance, it is tempting to assume that resistance is one of the essential democratic ideals, a bulwark of popular rights and freedoms against executive encroachment – something that distinguishes healthy democracies from those authoritarian regimes that brook no dissent. But a little reflection immediately complicates this picture. In the first place, many theorists of *representative* government have been at pains to rule out the legitimacy of collective resistance to the decisions of duly authorised representatives – especially if there is no

“people” prior to its representation.¹ There also seems to be a real difficulty in identifying criteria for resisting representatives to whom we have notionally given our consent. Others have suggested that the institutional mechanisms of constitutional democracy have superseded earlier forms of civic resistance, as increasingly complex systems of popular representation, political parties, checks and balances, veto and judicial review now do the job of maintaining the rectitude of governments.² Still others have articulated the rival view that in democratic states the collective body of the people might itself require resisting, a position that resonates with historical anxieties about legislative despotism and majority tyranny as well as more contemporary worries about plebiscites and referenda. Put bluntly, the role of resistance in representative democracies is far from clear, and requires further investigation.

My aim in this paper is to tease out some of these complexities through a discussion of what Benjamin Constant and Alexis de Tocqueville had to say about resistance and its relationship to “representative government” and democracy. Neither thinker is usually seen as a significant contributor to “resistance theory” as this category is conventionally understood.³ Nor has the first half of the nineteenth century featured very prominently in general accounts of resistance, although recent work on the concept has emphasised the significance of resistance in Carl von Clausewitz’s *On War* (published posthumously in 1832) and that text’s intellectual origins in German resistance to Napoleonic imperialism.⁴ Yet there are good reasons for returning to early nineteenth-century France, and to Constant and Tocqueville in particular, if one seeks a clearer understanding of the role and relevance of resistance in modern democracies, or – to use Constant’s preferred term – representative governments.⁵

¹ For the articulation of this thought in the work of Sieyès, see Michael Sonenscher, “Introduction”, in Emmanuel Joseph Sieyès, *Political Writings: including the debate between Sieyès and Tom Paine in 1791* (Indianapolis, IN: Hackett Publishing Co., 2003), xix.

² For discussion of this tension, with a particular emphasis on popular veto, see Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust*, trans. Arthur Goldhammer (Cambridge: CUP, 2008), ch. 5, “From the right of resistance to complex sovereignty”, 125–49.

³ Rosanvallon, however, rightly draws attention to Constant’s insistence on cultivating an attitude of distrust towards authority; see Rosanvallon, *Counter-Democracy*, 7. Rosanvallon’s work contains much useful material on the relationship of democracy to dissent. On defiance in Constant’s work, see Lucien Jaume, *L’individu effacé ou le paradoxe du libéralisme française* (Paris: Fayard, 1997), 106–8.

⁴ Howard Caygill, *On Resistance: A Philosophy of Defiance* (London: Bloomsbury, 2013), esp. chs. 1 & 2.

⁵ Conceptual distinctions between democracy, republic and representative government were of course crucial for the thinkers under discussion. For clarification of this point and its

Resistance was a key preoccupation of French political thought between the 1790s and the 1840s, finding expression in major works such as Germaine de Staël's 1817 *Considerations on the Principal Events of the French Revolution* (which considered in some detail the question of resistance to successive revolutionary and Napoleonic regimes) and in less familiar constitutional treatises such as Jean-Pierre Pagès' 1818 *Principes Généraux du Droit Politique* (which drew from Locke in setting the principle of resistance against that of prerogative).⁶ The theme was also a significant one in the writings of Constant and Tocqueville. Both authors, despite significant differences between them, suggested that the rise of democratically-legitimated states in post-revolutionary Europe rendered the question of resistance newly problematic. Constant's account was distinctive in relating resistance to what we might term plebiscitary democracy (a phrase Constant did not use), especially as this was understood in the light of Napoleon Bonaparte's claim to embody the sovereignty of the people.⁷ Tocqueville, while he certainly recognised this issue, went further in confronting the ways in which the relentless progress of administrative centralization, equality of conditions, and commerce might erode the capacity for civic resistance among modern democratic citizens.⁸ Both thinkers posed a range of more general questions about the relationship between resistance and revolution, resistance and constitutionalism, and about the kinds of moral and civic qualities and institutional structures needed to sustain resistance in democratic ages.

relevance to Constant, see especially Richard Whatmore, "The Politics of Political Economy in France from Rousseau to Constant", in Mark Bevir and Frank Trentmann, eds., *Markets in Historical Contexts: Ideas and Politics in the Modern World* (Cambridge: CUP, 2004), 46-69; Whatmore, "Democrats and Republicans in Restoration France", *European Journal of Political Theory*, 3:1 (2004), 37-51.

⁶ Germaine de Staël, *Considerations on the Principal Events of the French Revolution*, ed. Aurelian Craiutu (Indianapolis: Liberty Fund, 2008), 541-48, 740-44; Jean-Pierre Pagès, *Principes Généraux du Droit Politique, dans leur rapport avec l'esprit de l'europe et avec la monarchie constitutionnelle* (Paris, 1818), 486-92.

⁷ For a recent examination and contextualisation of this aspect of Constant's thought see Bryan Garsten, "From popular sovereignty to civil society in post-revolutionary France", in Richard Bourke and Quentin Skinner, eds., *Popular Sovereignty in Historical Perspective* (Cambridge: CUP, 2016), 236-69. For a broader examination of the category of *démocratie plebiscitaire*, see Rosanvallon, *La démocratie inachevée: Histoire de la souveraineté du peuple en France* (Paris: Editions Gallimard, 2000), 201-209.

⁸ For an account of Tocqueville's engagement with plebiscitary and Napoleonic conceptions of popular sovereignty, and the metaphors of "embodiment" or "incarnation" upon which these rested, see Lucien Jaume, *Tocqueville: The Aristocratic Sources of Liberty*, trans. Arthur Goldhammer (Princeton, NJ: Princeton University Press, 2013), 11-12, 21-22.

2. Constant on resistance: two contexts

In a significant revisionist account of Constant's (and James Madison's) conceptions of representative government, Bryan Garsten has noted that Constant possessed "a fundamental and unchanging desire to find ways of institutionalizing resistance to centralizing and usurping authority."⁹ Leaving aside, for the moment, the question of what might be entailed by the institutionalization of resistance, Garsten's insight suggests that questions of resistance were more fundamental to Constant's conception of the "representative system" than is usually recognised. Yet historians and political theorists have devoted little sustained attention to Constant's thinking on the subject. This is particularly surprising since Constant devoted the entirety of Book XVIII of his *Principles of Politics* to a detailed discussion of resistance and revolution, engaging closely with Jeremy Bentham's notorious dismissal of the right of resistance and with a range of further issues surrounding the topics of political obligation and obedience.¹⁰ Resistance was thus a topic in its own right for Constant, although it was intricately tied up with many better-studied aspects of his thought, most notably his preoccupations with "usurpation" and with the limitation of political authority. Questions about the legitimacy and utility of resistance ran through much of Constant's broader engagement with the French revolutionary legacy, right up until his late, and still rather understudied, *Commentary* on the work of the Italian thinker, Gaetano Filangieri (1827).¹¹ The present article focuses mainly on the 1806 draft version of the *Principles*, which Constant recycled for many of his subsequent works. The broader aim, however, is to clarify the role of resistance in the conception of representative government that Constant

⁹ Bryan Garsten, "Representative Government and Popular Sovereignty", in Ian Shapiro, Susan C. Stokes, Elisabeth Jean Wood and Alexander S. Kirshner, eds., *Political Representation* (Cambridge: CUP, 2010), 90-110, at 100.

¹⁰ Benjamin Constant, *Principles of Politics Applicable to All Governments*, ed. Etienne Hofmann, trans. Dennis O'Keefe, with intro. by Nicholas Capaldi (Indianapolis: Liberty Fund, 2003), bk. XVIII, "On the duties of individuals to political authority", 395-422. For a full discussion of this material, along with a later (1817) article entitled "De l'obéissance à la loi", see Jaume, *L'individu effacé*, 95-103.

¹¹ Benjamin Constant, *Commentary on Filangieri's Work*, trans., ed., with an intro. by Alan S. Kahan (Indianapolis: Liberty Fund, 2015).

elaborated as an alternative to both the Jacobin politics of ancient liberty and the Napoleonic politics of “conquest and usurpation.”¹²

Constant’s discussion of resistance formed part of his broader response to the French Revolution, a major consequence of which was to have severely problematized the issue of resistance to popular regimes. As is well known, the 1789 Declaration of the Rights of Man and the Citizen had elevated the “right of resistance to oppression” into one of the “natural and imprescriptible” rights of man, while a more radical “duty” of insurrection was added, at the behest of Saint-Just, to the Montagnard version of the Declaration, which served as a preamble to the proposed 1793 Constitution. Both texts held out popular resistance as a legitimate response to political oppression, while the 1793 text framed insurrection as a kind of ultimate guarantee for the various other rights.¹³ Yet, as the unfolding of the Terror dramatically illustrated, a “government of insurrection” claiming to act in the name of the people and to uphold their rights could itself become an agent of oppression that required resisting.¹⁴ Constant’s thinking about resistance was, at least in part, a response to this conundrum. Most fundamentally, the Terror threw into stark relief the problem of resisting the governments of representative states which claimed to embody the will of the people and,

¹² Benjamin Constant, “The spirit of conquest and usurpation and their relation to European civilization”, in Constant, *Political Writings*, ed. Biancamaria Fontana (Cambridge: CUP, 1988), 43-167.

¹³ For an English translation of the 1789 text, along with valuable essays on its context and content, see Dale van Kley, ed., *The French Idea of Freedom: The Old Regime and the Declaration of Rights of 1789* (Stanford, CA., Stanford University Press, 1994). For more detailed consideration of the specific right to resist oppression, see Micah Alpaugh, “The Right of Resistance to Oppression: Protest and Authority in the French Revolutionary World”, *French Historical Studies*, 39:3 (2016), 567-589; François Charbonneau, “Institutionnaliser la droit à l’insurrection. L’article 35 de la constitution montagnarde de 1793”, *Tangence*, 106 (2014), 93-112. For discussion of Condorcet’s contribution to the 1793 constitution on the issue of resistance, see David Williams, *Condorcet and Modernity* (Cambridge: CUP, 2004), 64-8.

¹⁴ For a broader account of the role played by philosophical principles of natural right in the period of the Terror, see Dan Edelstein, *The Terror of Natural Right: Republicanism, the Cult of Nature, and the French Revolution* (Chicago, IL: University of Chicago Press, 2009), esp. ch. 3. The Jacobin claim to embody popular insurrection was criticised by Constant in a note: see Constant, *Principles*, 28, n. It was later endorsed in the major early nineteenth-century apology for the “dictatorship of insurrection”; see Filippo Buonarroti, *Babeuf’s Conspiracy for Equality; with the author’s reflections on the causes and consequences of the French Revolution, and his estimate of the leading men and events of that epoch*, trans. Bronterre (London, 1836), 305.

for that reason, claimed to require no limitations on the scope of their authority.¹⁵ In addition, Constant was sensitive to the ways in which invocations of “alleged reasons of public safety” – pretexts for arbitrary measures under conditions of emergency government – had worked both to delegitimise resistance and to intensify repression.¹⁶ According to Constant, the Terror had created a climate in which legitimate resistance was easily reframed as sedition, as was illustrated by the persecution of French priests during this period: “If one or two actions provoke opposition, this resistance to which injustice alone led is itself quoted in support of injustice... Thus we have seen the agents of the Terror among us forcing priests to resistance by refusing them any security when they submit and then justifying clerical repression by their resistance.”¹⁷

Similar concerns about the status of resistance within regimes claiming to be built upon the direct acclamation of the people featured in Constant’s analysis of the Napoleonic Empire. According to him, supporters of the imperial state established in 1804 sought to legitimise the regime by appealing to a flawed conception of popular sovereignty that ultimately ruled out the possibility of resistance. The key culprit here was Louis-Mathieu Molé, whose pro-imperial *Essais de morale et de politique* (1806), Constant argued, amounted to a vaguely Hobbesian reworking of Jean-Jacques Rousseau’s *Social Contract*. According to Molé himself, resistance to state authority was both absurd and contradictory, since it involved undermining the “personification” of the societal assemblage to which one had already bequeathed one’s interests and power.¹⁸ Constant understood this as a garbled application of Rousseau’s claims that political authority had to be “absolute” and “unlimited” to the legitimisation of Napoleon’s regime. This aspect of Constant’s thought is well-known, but it is worth underlining that it had implications for the question of resistance:

¹⁵ Constant, *Principles*, 19-20.

¹⁶ For discussions of Constant’s criticisms of the language of reason of state during the Terror, see especially Stefano de Luca, “Benjamin Constant and the Terror”, trans. Arthur Goldhammer, in Helena Rosenblatt, ed., *The Cambridge Companion to Constant* (Cambridge: CUP, 2009), 92-114; Stephen Holmes, “Rethinking liberalism and terror”, in Helena Rosenblatt and Raef Geenens, eds., *French Liberalism from Montesquieu to the present day* (Cambridge: CUP, 2012), 90-112. For Constant’s critique of “alleged reasons of public safety”, see also Benjamin Constant, “The liberty of the ancients compared with that of the moderns”, in *Political Writings*, ed. Fontana, 322.

¹⁷ Constant, *Principles*, 75.

¹⁸ Louis-Matthieu Molé, *Essais de morale et de politique* (Paris, 1806), 139-40, 142-3.

Just as Rousseau says that the individual cannot resist society because he has handed over his rights to it, without reserve, this man [i.e. Molé] claims that the authority of the depository of power is absolute, because no member of the collectivity can struggle against the collectivity as a whole. He also claims that there can be no responsibility on the part of the depository of power, since no individual can be in dispute with the body of which he is a part, and that the latter can respond only by making him return to the order he never should have left.¹⁹

There was a further, historical dimension to these arguments that is also worth briefly sketching here. Although Constant can hardly be described as an admirer of the French *ancien régime*, he drew a sharp contrast between the erosion of resistance in the centralising post-revolutionary state and the more vital forms of resistance that characterised the French monarchy in an earlier period. In this respect his thinking had some affinity with the account of aristocratic “disobedience” to monarchical power set out in Montesquieu’s *Spirit of the Laws* (1748), which had identified the French nobility’s distinctive conception of honour as supplying the psychological basis for their resistance to sovereign commands (most dramatically exemplified, Montesquieu suggested, in several key episodes during the French Wars of Religion).²⁰ To some extent this is surprising, since Constant is usually regarded as a critic of Montesquieu’s conception of monarchy (with its picture of the nobility as an intermediary power), along with the sorts of “aristocratic liberalism” that took inspiration from Montesquieu’s text.²¹ Yet while Constant certainly rejected hereditary aristocracy as a “defective institution” whose revival in post-revolutionary France could only be an anachronism, he nevertheless recognised that noble privileges had historically served as the basis of a “spirit of resistance” within the monarchy:

¹⁹ Constant, *Principles*, 24.

²⁰ Charles de Secondat, baron de Montesquieu, *The Spirit of the Laws*, trans. Anne M. Cohler, Basia C. Miller and Harold Stone (Cambridge: CUP, 1989), 33 (IV.2). See further Montesquieu, *Persian Letters*, trans. with intro. by George R. Healy (Indianapolis: Hackett, 1999), 173.

²¹ On Constant and Montesquieu, see especially Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* (New Haven, CT: Yale University Press, 1984), 21, 90; on aristocratic liberalism see Annelien de Dijn, *French Political Thought from Montesquieu to Tocqueville: Liberty in a Levelled Society?* (Cambridge: Cambridge University Press, 2008), 73.

The French under the monarchy were not completely deprived of political rights until after Richelieu. I have already said that defective institutions which nevertheless endow the powerful classes with certain privileges they are ceaselessly busy in defending have, in their favour, amid their many disadvantages, the fact that they do not leave the whole nation to degradation and debasement. The beginning of the reign of Louis XIV was still disrupted by the war of the Fronde, a puerile war in truth, but one which was the residuum of a spirit of resistance, habituated to action and continuing to act almost without purpose. Despotism grew greatly towards the end of this reign.²²

This picture stood in contrast with the diminished capacity for resisting sovereign power in post-revolutionary societies. Here again Constant drew upon Montesquieu, responding specifically to Montesquieu's chapter "On Ideas of Uniformity" in his own chapter with that title.²³ Montesquieu's discussion of the mania for uniformity may have caught Constant's eye because it resonated with his own hostility towards the obsessive desire of modern politicians to establish a "smooth surface over which the lofty eye of government can freely stray, without encountering any inequality which offends it or obstructs its view."²⁴ Again, this had implications for resistance. In an earlier passage which reads as a not-so-veiled critique of the Napoleonic regime, Constant suggested that the combination of a commercialised economy with a fierce drive towards administrative uniformity was depriving the subjects of modern states of their capacity for resisting the mechanisms of power:

Everything is more expensive because men insist on payment for being reduced to the level of mere machines. Money has to take over the functions of opinion, imitation, and honour. Everything is harder, because nothing is voluntary. The government is obeyed rather than supported. At the least interruption all the cogs stop operating. It is like a game of chess. The hand of power controls it. No pieces resist. But if the hand were to stop for a moment, all the pieces would remain immobile.²⁵

²² Constant, *Principles*, 113.

²³ There is a fuller discussion of Constant's response to this chapter in Arthur Ghins, "Benjamin Constant and the politics of reason", *History of European Ideas* (2018), online, 12.

²⁴ Constant, *Principles*, 323.

²⁵ Constant, *Principles*, 123.

The essential point is that Constant considered the Revolution and its Napoleonic aftermath to have decisively undermined the ability of citizens to resist sovereign power. The main claim was that successive Jacobin and Napoleonic articulations of the principle of popular sovereignty had contributed to a form of plebiscitary democracy that ruled out both individual resistance to sovereign power *and* any real responsibility on the part of political rulers. The problem with this understanding of democracy did not spring from its grounding on majority rule, but rather from the absence of any meaningful distinction between the people and its representatives (due to what Molé described as their total “identification”), and the resulting absence of any meaningful restrictions upon state power.²⁶ At the same time, the defective but sturdy aristocratic institutions that had sustained resistance in the monarchical past had now given way to an obsessively centralizing administrative state (the contemporary German term was “state-machine”) that reduced individuals to cogs in a machine.²⁷ The problem of resistance was thus related to Constant’s broader evaluation of the central paradox of the Revolution itself, which was that a revolution accomplished in the name of popular rights and liberties should have resulted in a more unlimited form of state power and correspondingly diminished protections for individual rights.²⁸ Any viable account of modern representative government thus had to make room for some form of resistance to power.

3. Between passive obedience and revolution: Constant on legitimate resistance

²⁶ On this point see Garsten, “Representative Government and Popular Sovereignty”, 100-101.

²⁷ On state-machines, see Eva Piirimäe, “State-machines, commerce and the progress of *Humanität* in Europe: Herder’s response to Kant in *Ideas for the Philosophy of History of Mankind*”, in *Commerce and Peace in the Enlightenment*, ed. Béla Kapossy, Isaac Nakhimovsky and Richard Whatmore (Cambridge: CUP, 2017), 155-91.

²⁸ In a note to the text of his *Cours de politique constitutionnelle*, Constant wrote that it “is quite remarkable, that the absolute unity of action, without restriction, without limits, has never been greeted more favourably than in a revolution made in the name of the rights and liberties of men” (“Il est assez remarquable que l’unité d’action absolue, sans restriction, sans limites, n’ait jamais rencontré plus de faveur que dans une révolution faite au nom des droits et de liberté des hommes”). See Benjamin Constant, *Collection complete des ouvrages publiés sur le Gouvernement représentatif et la Constitution actuelle de la France, formant une espèce de Cours de politique constitutionnelle*, 4 vols. (Paris/Rouen, 1818-1820), 1:196.

While the main task in what follows is to understand the role Constant ascribed to resistance in his alternative conception of representative government, we first need to consider his to establish a more normative set of criteria for legitimate resistance. This he attempted to do most systematically in Book XVIII of the *Principles*, which was entitled “On the Duties of Individuals to Political Authority,” and which dealt with a number of longstanding questions in the subject of political obligation.²⁹ His starting point – in a chapter entitled “Difficulties with Regard to the Question of Resistance” – was to note that judgements of when to resist, and under what circumstances, were never straightforward. Like David Hume and many other eighteenth-century thinkers, he recognised that republican doctrines of resistance could open the way to “abuses and crimes,” and suggested that in ordinary circumstances individuals had no right to resist the government.³⁰ He also emphasised the difficulty, confronted famously by Hobbes and Kant, of establishing clear guidance about allegiance to new regimes that had been created by conquest or revolution.³¹ Who could say when obedience should be transferred from the government of a failed state to the leaders of a successful revolution? The question was rendered even more complicated in states where allegiance could be divided between rival powers, as in the mixed constitution of Great Britain. Nevertheless, Constant’s overriding aim in Book XVIII was to undermine the more extreme positions of thinkers, from Blaise Pascal to Jeremy Bentham, who had advocated a “doctrine of boundless obedience to the law.”³² It was absurd, he suggested, to insist that obedience was owed to the Roman Empire under Nero, Vitellius, and Caracalla, or indeed to Robespierre’s Committee of Public Safety. Constant argued that few thinkers were consistent proponents of passive obedience: even Pascal had sought to exclude matters of religion from the province of the civil magistrate. Constant was particularly exercised by Bentham’s suggestion that the law alone created crimes, which was as if to say that there

²⁹ See also Jaume, *L’individu efface*, 95-103.

³⁰ Constant, *Principles*, 397, 403. For Hume’s discussion of resistance see especially David Hume, “Of passive obedience”, in Hume, *Political Essays*, ed. Knud Haakonssen (Cambridge: CUP, 1994), 202-220.

³¹ For Hobbes’s account of this problem, see Quentin Skinner, “Conquest and consent: Hobbes and the engagement controversy”, in Skinner, *Visions of Politics. Volume III. Hobbes and Civil Science* (Cambridge: CUP, 2002), 287-307. Kant’s discussion of the conceptual difficulties generated by successful revolutions appears in Immanuel Kant, “On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice’”, in Kant, *Political Writings*, ed. H. S. Reiss (Cambridge: CUP, 1991), 61-92, at 83-4.

³² Constant, *Principles*, 402. For further discussion of these passages, see K. Steven Vincent, “Benjamin Constant and Constitutionalism”, *Revista de Historia Constitucional*, 16 (2015), 19-46, at 27-30.

were no natural sanctions against parricide, for example.³³ As Emmanuelle de Champs has recently shown, these arguments formed part of a broader current of opposition to Bentham's utilitarianism among liberals, notably Germaine de Staël, in this period.³⁴

Constant developed several lines of argument against these doctrines of "boundless obedience to law" which had immediate implications for his thinking about resistance. The baseline was his conception of an inviolable sphere of individual rights, which for him set clear limits to the permissible scope of political power and authority. Even more fundamentally, however, his criticism of passive obedience stemmed from his conception of human beings as autonomous moral agents. As he pointed out in the 1815 version of the *Principles*, nobody would condemn a soldier who had refused to follow the order of his drunken corporal to shoot his own captain. This was Constant's way of pointing out that mankind's natural moral capacity for "intelligence and reflection" inevitably intervened in judgements of obedience and resistance, enabling subjects to distinguish "right from violence." Theorists who denied this capacity for moral reflection were threatening to "let loose upon human society instruments of arbitrariness and oppression which any blind or furious power may unleash at will."³⁵ But the fundamental point was that individuals possessed a kind of moral conscience, violations of which provided a clear justification for disobedience and resistance:

As long as a law, although bad, does not tend to deprave us, as long as the encroachments of government demand only sacrifices which render us neither base nor savage, we can acquiesce in them. We compromise only on our own behalf. If the law demands, however, that we trample on our affections or duties, if, on the absurd pretext of a gigantic and false devotion to which it by turns calls monarchy or republic, or prince, or nation, it forbids us fidelity to friends in need, if it demands from us treachery to our allies, or even the persecution of vanquished foes, then anathema and disobedience to this corrupting government and to the drafting of injustices and crimes which it decorates with the name of law.³⁶

³³ Constant, *Principles*, 399-400.

³⁴ For a discussion see Emmanuelle de Champs, *Enlightenment and Utility: Bentham in French, Bentham in France* (Cambridge, 2015), 184-91; see also Holmes, *Benjamin Constant*, 125-27; Jaume, *L'individu effacé*, 91-5.

³⁵ Constant, *Political Writings*, 245.

³⁶ Constant, *Principles*, 404.

Somewhat reminiscent of Hume, Constant posited a natural principle of sympathy or pity standing behind systems of law and government: “It is to make individual pity inviolable that we have made the authority of government commanding.”³⁷ But in extreme cases the natural sentiments of pity or sympathy could rebel, as it were, against the artificial structures of law and authority. In this way, mankind’s moral sense (based on pity or sympathy) shaped judgements about the justice or legitimacy of law, and thus supplied an alternative to Bentham’s legal positivism. As Constant put it elsewhere in this section, no obedience was owed to laws whose “corrupting influence menaces what is noblest in our being.”³⁸

Constant’s other major aim in Book XVIII was to distinguish legitimate resistance from a more thoroughgoing right to revolution. As he put it in the notes, there was a significant gap between resistance, which tended simply to “repulse oppression,” and revolution, which aimed to “organize government under new forms.”³⁹ Resistance was a right, and could be activated whenever individual rights (or those of minorities) were violated. Revolution, by contrast, was never a right, and it was naïve to think that the legitimacy of revolution could be decided in advance by an appeal to fixed rules. Indeed, revolutions were better seen naturalistically as quasi-physical events (“physical upheavals,” “ungovernable waves”) that resulted from the specific constellation of public opinion at a given moment.⁴⁰ Here, Constant explicitly adapted Hume’s famous dictum that authority rested ultimately upon opinion to emphasise that revolutions could not be decided in advance by a kind of juridical calculus.⁴¹ The emphasis on public opinion, however, also provided a baseline for distinguishing between revolutions that could be endorsed, and those that had to be condemned. Constant praised the Glorious Revolution of 1688-89 as well as the American Revolution of 1776-83 as examples of successful revolutions that had tracked the disposition of public opinion at the time. By contrast, the imposition of violent minority rule during the French Revolution after 1793, or in republican England after the death of Cromwell,

³⁷ Constant, *Principles*, 403.

³⁸ Constant, *Principles*, 402.

³⁹ Constant, *Principles*, 521.

⁴⁰ Constant, *Principles*, 406-07.

⁴¹ See David Hume, “Of the first principles of government”, in Hume, *Political Essays*, ed. Knud Haakonssen (Cambridge: Cambridge University Press, 1994), 16. For an incisive examination of the context and intellectual consequences of Hume’s position, see Paul Sagar, *The Opinion of Mankind: Sociability and the Theory of the State from Hobbes to Smith* (Princeton, NJ., Princeton University Press, 2018).

amounted to the “running ahead of opinion” and, as such, was doomed to failure.⁴² The point was intended as a prudential one, and was in the spirit of Hume’s own invocation of opinion as a foundational stone of politics.

In all this Constant was steering a middle course between active resistance (with its revolutionary or insurrectionary overtones) and the theories of passive obedience he associated with Pascal and Bentham. The result was to restrict legitimate resistance to what Constant called “passive resistance,” which entailed “neither upheavals, nor revolutions, nor disorders.”⁴³ It simply entailed a refusal to execute unjust laws or commands, a limited stance that was nevertheless capable of significantly frustrating tyranny or Terror.⁴⁴ In ordinary times, the clear imperative was to maintain political stability and the peace of society, and this, Constant recognised, required an attitude of flexibility towards minor infringements upon individual rights.⁴⁵ It is also worth noting here that Constant ruled out as anachronistic in the modern world the appeal to tyrannicide that had been a key expression of resistance in ancient republics. The ancient law of Valerius Publicola, permitting “the summary killing of anyone aspiring to tyrannical rule”, had in practice become a source of political instability and class conflict that had undermined the Roman republic.⁴⁶ This cautiousness about active resistance remained with Constant into the final decade of his life. In a February 1825 speech at the Chamber of Deputies, in which he argued against indemnification for the losses sustained by French *émigrés* since 1789, Constant challenged the royalist *émigrés* for having in practice exercised a “right of resistance” in 1789 and for having constituted themselves as the “judge of royal declarations and wills.” While Constant recognised the principle of resistance within limits, he could not endorse “a principle which would furnish to all factions a banal pretext for permanent insurrection.”⁴⁷

4. Constant on resistance in institutions

⁴² Constant, *Principles*, 408.

⁴³ Constant, *Principles*, 404.

⁴⁴ Constant, *Principles*, 404.

⁴⁵ Constant, *Principles*, 401.

⁴⁶ Constant, *Principles*, 88.

⁴⁷ Benjamin Constant, *Discours de M. Benjamin Constant, député de la Seine, Sur le Projet de Loi d’indemnités: Prononcé dans la séance du 23 février 1825* (Paris, 1825), 13.

We are now in a better position to reassess the place of resistance in Constant's wider conception of representative government, and to consider more precisely Garsten's suggestion that Constant sought to institutionalise resistance within post-revolutionary states. While his comments on this broader topic were spread across the text of the *Principles*, they reveal his consistent anxiety about the difficulties of resisting highly centralized post-revolutionary governments, and his search for alternative bases for resistance in the modern world. A crucial question here, which to some extent mirrors traditional scholarly disputes about the overall character of Constant's liberalism, was whether the practice of resistance demanded a degree of civic virtue or public spirit among citizens, or whether it could be sustained through institutional mechanisms alone.

Constant offered at least three lines of argument about the prospects for establishing viable forms of resistance against centralizing modern states. The first appeared in the chapter on uniformity. As we have seen, Constant ruled out Montesquieu's intermediary nobility as a viable basis for resistance to sovereign power in post-revolutionary Europe.⁴⁸ The alternative he sketched out in his discussion of uniformity was anchored, instead, in the potential of local patriotic sentiments and interests in contesting and moderating these tendencies towards administrative uniformity and centralization. This point emerged in the context of a discussion of the respective advantages of small and large states and their degree of compatibility with patriotism, a question that had been central to European political debate since Montesquieu.⁴⁹ Constant's answer was to advocate a kind of quasi-federal *via media* in which the advantages of large states (their capacity for implementing large-scale legislative reforms) would be combined with the advantages of small states (their ability to foster patriotic virtues).⁵⁰ But the key point here is that he explicitly identified these "local interests and memories" as the foundation of a "principle of resistance which government allows only with regret and which it is keen to uproot."⁵¹ Similar claims found their way into the published (1815) version of the *Principles*, in which Constant offered a more thoroughgoing

⁴⁸ On Constant's rejection of Montesquieu's position on the nobility as an intermediary power, see also Holmes, *Benjamin Constant*, 10, 21; for a slightly different emphasis see Ghins, "Benjamin Constant and the Politics of Reason", 4.

⁴⁹ On small and large states see especially Richard Whatmore, "'Neither masters nor slaves': small states and empire in the long eighteenth century", in Duncan Kelly, ed., *Lineages of Empire: The Historical Roots of British imperial thought*. Proceedings of the British Academy, 155 (Oxford: Oxford University Press, 2009), 53-81.

⁵⁰ Constant, *Principles*, 324-325; cf. *Political Writings*, 253.

⁵¹ Constant, *Principles*, 326.

account of a kind of internal federalism, based on a comprehensive remodelling of relationships between municipal and executive powers.⁵² Here Constant put his faith in an ideal of local patriotism, grounded upon experience, interest, and sociability, as an alternative to the highly abstract appeals to a kind of artificial nation by the Jacobins and Napoleon. It is also worth noticing that Constant's language here seems to prefigure Tocqueville's more famous anxieties about social atomization that accompanied the drive for equality: local resistance was urgent for individuals "living only in a swift-moving present and thrown like atoms on a monotonous plain."⁵³

The second line of argument centred on the possibility of building resistance into the structure of the constitution itself. Two main possibilities suggested themselves. First, Constant emphasised the historical role played by an independent judiciary in resisting sovereign power. His main example was drawn from seventeenth-century English history:

As long as due process subsists, the courts will put in despotism's path a resistance, more or less generous, but which always seeks to contain it. Under Charles I, the English courts acquitted several friends of liberty, despite threats from the Court. Under Cromwell, although dominated by the Protector, they often set free citizens accused of royalism.⁵⁴

Second, Constant gave careful thought to the problem of how to endow representative assemblies with sufficient force and authority to resist executive encroachment. Here the context is significant. In December 1799, in the aftermath of the *coup d'état* of 18 and 19 Brumaire, the Idéologue Pierre-Jean-Georges Cabanis had advocated a distinctive conception of the Consulate as a modern representative democracy, characterised by a combination of a strong executive with an enlightened legislative assembly.⁵⁵ Cabanis argued that the latter aim was best attained by conferring the choice of representatives upon a single, unitary electoral body at the "summit" rather than the "base" of the political system, effectively

⁵² Constant, *Principles of Politics* [1815], in Constant, *Political Writings*, 251-5.

⁵³ Constant, *Principles*, 326.

⁵⁴ Constant, *Principles*, 155.

⁵⁵ Pierre-Jean-Georges Cabanis, *Quelques considerations sur l'organisation social en général et particulièrement sur la nouvelle constitution* (Paris, 1799), 19. For further discussion see Ghins, "Benjamin Constant and the politics of reason".

sundering the connection between representatives and constituents.⁵⁶ Constant firmly rejected this conception of representative government. Not only did it block the upward representation of local interests and prohibit the formation of national spirit among citizens, but the lack of a genuinely popular electoral foundation also deprived the legislature of the authority necessary to resist the executive. The alternative he proposed was to “invest national representation with real force, and give it deep roots in public opinion.” The essential point was that only by grounding their legitimacy in popular election could representative assemblies gain sufficient authority to stand up to the executive: “When assemblies which call themselves representative are not selected by the people, they are helpless before the executive power. If they put up some resistance to it, it demands to know by what right.” The electoral college dreamed up by Cabanis and other supporters of the Consulate could easily select the members of an enlightened legislature, but it could not secure the “inviolable credentials for opposing the government” that, in Constant’s view, characterised the eighteenth-century English House of Commons, nor could it sustain the “moral electricity” generated in boisterous local elections.⁵⁷

Constant’s emphasis on popular election as a means of promoting resistance to executive power, along with his broader vision of local associations in opposing centralizing authority, certainly reveal his eagerness to “institutionalise” resistance in a variety of ways. Resistance was in this sense conceived as a property of the constitution, as for example in the “effective and insurmountable resistances” (*résistances efficaces et insurmontables*) that Constant claimed were needed to prevent excessive government borrowing.⁵⁸ But it should be noted that his conception of resistance did not rest on institutional mechanisms alone. As has been widely demonstrated in scholarship, Constant’s conception of modern liberty was far from offering a complacent endorsement of the private pursuit of self-interest within an elaborate constitutional machinery, and instead required that modern citizens engage in the “constant and active surveillance” of their representatives.⁵⁹ Some degree of political participation and

⁵⁶ Cabanis, *Quelques considerations sur l’organisation social*, 25-6.

⁵⁷ Constant, *Principles*, 332.

⁵⁸ Benjamin Constant, “Projet de la loi sur le budget”, in Constant, *Collection complète des ouvrages*, II.364; see the discussion in Jean-Philippe Feldman, “Le constitutionnalisme selon Benjamin Constant”, *Revue française de Droit constitutionnel*, 76:4 (2008), 675-702, at 701.

⁵⁹ See classically Benjamin Constant, “The Liberty of the Ancients Compared with that of the Moderns”, in Constant, *Political Writings*, 307-28. For a persuasive statement of Constant’s desire to avoid “overprivatization” as much as “overpoliticization” see Holmes, *Benjamin Constant and the Making of Modern Liberalism*, 20-21.

civic vigilance was necessary to make modern liberty secure. Constant's discussion of resistance confirms and deepens this familiar point. In the section of the *Principles* dealing with the "Arbitrary Measures" pursued by the Committee of Public Safety, Constant had already argued that citizens' preparedness to resist instances of oppression, even when inaction might appear to be the safer course, was crucial to maintaining the freedom of the state. Against the "worthless and specious argument" that prudence required keeping silent in the face of oppression, Constant argued that each individual's safety depended on his or her willingness to resist, since the gradual generalization of a condition of arbitrariness would ultimately render everybody's liberty precarious.⁶⁰ This seems embody at least one dimension of what Skinner has termed the neo-Roman argument, i.e. that civic engagement (or service) was essential to securing the political structure of a free state upon which individual freedoms depend.⁶¹ It is worth noting that Constant's famous lecture on ancient and modern liberty contained a single (but significant) reference to resistance, where he claimed that the exercise of political liberty enabled citizens to "choose with discernment, resist with energy, brave threats, nobly withstand seduction."⁶² From this perspective, maintaining a principle of resistance in the state was not just a matter of getting the institutional architecture right; it was also a fundamental requirement of modern republican citizenship – and in Constant's terms it was a duty.

5. Tocqueville on democracy and resistance

Tocqueville's discussion of resistance was much more dispersed than Constant's, and his works contained nothing equivalent to the detailed examination of the principles of political obligation contained in Book XVIII of Constant's *Principles*. Yet the concept of resistance figured far more prominently in *Democracy in America* than is usually recognised. One reason for the concept's relative invisibility to scholars may be that Tocqueville said very little (but not quite nothing) about the *right* of resistance: to an even greater extent than

⁶⁰ Constant, *Principles*, 77-78.

⁶¹ I am not suggesting that Constant signed up to every strand of such arguments. The centrality of public service to the republican tradition (as reconstructed by Skinner) is developed most fully in Quentin Skinner, "The idea of negative liberty: Machiavellian and modern perspectives", in Skinner, *Visions of Politics: Volume II. Renaissance Virtues* (Cambridge: CUP, 2002), 186-212, esp. at 206.

⁶² Constant, "Liberty of the Ancients", 327.

Constant, he abandoned the juridical idiom in which discussions of resistance had traditionally been couched and turned towards a broader analysis of the meaning and possibility of resistance in modern democratic societies. Interestingly, one of his few engagements with traditional questions of political obligation arose in connection with a question about the legitimacy of unjust but democratically-sanctioned laws, a problem to which he gave a clear answer: “when I refuse to obey an unjust law, I am not denying the right of the majority to command; I am only appealing from the sovereignty of the people to the sovereignty of the human race.”⁶³ A second point that requires careful handling is the bewildering variety of contexts in which he used the language of resistance. Tocqueville wrote about the resistance of women to men’s sexual advances, about national resistance to military conquest, about “resistance to innovations,” and about the ability of individuals to resist the intellectual conformity and soft despotism of opinion that characterised nineteenth-century societies.⁶⁴ Some of these usages were not obviously political, as when he wrote about the historical “irresistibility” of democracy itself.⁶⁵ Nevertheless, Tocqueville certainly did use the term resistance in a political sense (and, in any case, we should not be too hasty to dismiss the more metaphorical usages as irrelevant to his political thinking). The crucial point, however, is that he clearly associated the rise of the large democratic republic with a diminution of the possibility of resistance. One claim was that the deep isolation or “atomization” of individuals in large democracies made them decreasingly capable of mounting any real resistance to sovereign power, especially when that power was grounded on the legitimacy of democratic majorities. But he also identified a range of more intangible forces that were eroding the capacity of modern democratic citizens to engage in resistance.

Like Constant, Tocqueville’s discussion of resistance glanced backwards to eighteenth-century sources such as Montesquieu and was shaped by his assessment of the revolutionary and Napoleonic legacies. In his notes towards his unfinished volumes on the history of the revolution and Napoleon, for example, he echoed Constant’s observations about the mutually

⁶³ Tocqueville, *Democracy in America*, ed. Eduardo Nolla, trans. James T. Schleifer, 2 vols. (Indianapolis: Liberty Fund, 2012), 1.410

⁶⁴ On “soft despotism” (and “democratic despotism”) see Paul A. Rahe, *Soft Despotism, Democracy’s Drift: Montesquieu, Rousseau, Tocqueville and the Modern Prospect* (New Haven, CT.: Yale University Press, 2009), 154-89.

⁶⁵ The concept of democracy’s irresistibility was first worked out in Doctrinaire circles: see Aurelian Craiutu, *Liberalism under siege: The political thought of the French Doctrinaires* (Lanham, MD: Lexington Books, 2003), 106.

reinforcing character of resistance and oppression during the period of the Terror.⁶⁶ But Tocqueville's discussion was also firmly rooted in the context of the 1830s. Contemporaries frequently framed the July Revolution of 1830 as a successful and legal act of resistance against the violations of the *Charte* by the unjust and arbitrary government of Charles X.⁶⁷ More widely, the 1820s and early 1830s saw episodes of transnational resistance to monarchical empires, notably in Greece and Poland.⁶⁸ There was a revival of interest in the principles of resistance within German and Swiss liberal circles following the famous Hambacher Fest of 1832.⁶⁹ Tocqueville himself justified his own support for the new regime of Louis-Philippe in the language of resistance, declaring that "resistance seemed legitimate to me and that I would resist in my narrow sphere."⁷⁰ He repeated this account in his *Souvenirs*, where he noted that Charles X had "violated rights that were dear to me, and I was able to hope that my country's freedom would be revived rather than extinguished by his fall."⁷¹ It is worth contrasting this with Tocqueville's assessment of the events of 1848-49, which he characterised, more negatively, as an insurrection – or, more accurately, as a cycle of insurrections.⁷² In distinguishing resistance and insurrection, Tocqueville did not go quite as far as the Doctrinaire thinker and politician, François Guizot, whose leadership of the *parti de résistance* blunted the radical potential of the term and associated it with a more conservative politics.⁷³ But he did seek to distinguish a more moderate form of resistance ("honest acts of resistance and legitimate rebellions") from insurrections and revolutions.⁷⁴

⁶⁶ Tocqueville, *The Old Regime and the Revolution: Volume II. Notes on The Revolution and Napoleon*, trans. Alan Kahan (Chicago, 2001), 216.

⁶⁷ See the introduction and the pieces collected in André-Marie-Jean-Jacques Dupin, *Révolution de Juillet 1830. Caractère légal et politique du nouvel établissement fondé par la charte constitutionnelle acceptée et jurée par Louis-Philippe 1er* (Paris, 1833), 1-8; 78-80.

⁶⁸ For a recent overview, see Richard Evans, *The Pursuit of Power: Europe 1815-1914* (London: Allen Lane, 2016), 46-80.

⁶⁹ For example, see Friedrich Murhard, *Ueber Widerstand, Empörung und Zwangsübung der Staatsbürger gegen die bestehende Staatsgewalt* (Braunschweig, 1832).

⁷⁰ Cited in Eduardo Nolla's "Editor's Introduction" to Tocqueville, *Democracy in America*, I.lx.

⁷¹ Alexis de Tocqueville, *Recollections: The French Revolution of 1848*, ed. J. P. Mayer and A. P. Kerr, intro. Fernand Braudel (Brunswick, NJ: Transaction Publishers, 1987), 65.

⁷² On insurrection, see Tocqueville, *Recollections*, 72, 136-37, 144.

⁷³ Guizot's more conservative conceptualisation of resistance can be seen in his 1849 *Democracy in France*, in which he looked back at the summer of 1830 as evidence of the need for governmental "resistance" towards democracy and anarchy; see François Guizot, *Democracy in France* (New York, 1849), 16-17.

⁷⁴ Tocqueville, *Democracy in America*, II.1274.

To appreciate the significance of resistance to Tocqueville's thinking about modern democracy we need, however, to look more closely at *Democracy in America* itself, especially its first (1835) volume. And what is immediately striking about that text is the extent to which Tocqueville framed his analysis of democracy in terms of a diminished capacity for resistance to sovereign power. One reason for the weakness of resistance under democracies stemmed from the "absolute" nature of majority rule. As he announced in the famous chapter "Of the Omnipotence of the Majority in the United States and Its Effects," "the very essence of democratic government is that the dominion of the majority be absolute; for in democracies, nothing outside the majority can offer resistance."⁷⁵ This association of modern democracy with the notion of "irresistible" power was more than a peculiarity of semantics. As he went on later in the chapter, the worst feature of democratic government in the United States was "not its weakness as many people in Europe claim, but its irresistible strength."⁷⁶ This raised questions not only about the capacity of minorities to resist majorities, but also about the logic of individual resistance to democratically-legitimated sovereign decisions *tout court*. Earlier in the book he had made a similar point which came very close to Constant's anxieties about the Bonapartist usurpation of popular democratic legitimacy. According to Tocqueville, "There is nothing so irresistible as a tyrannical power that commands in the name of the people, because, while vested with the moral power that belongs to the will of the greatest number, it acts at the same time with the decisiveness, promptitude and tenacity that a single man would have."⁷⁷ We might initially conclude that an incapacity to resist majority domination was a key feature of Tocqueville's description of democracy itself, or at least its more pathological expressions.

The diminished capacity for resistance that Tocqueville associated with democratic societies stood in sharp contrast with the greater vitality of resistance in aristocratic societies. On this issue, Tocqueville's thinking was even closer to Montesquieu's *Spirit of the Laws* than Constant's had been, although he was probably also building on the philosophical histories of civilization of the period of the Restoration, notably those of Guizot, whose lectures he had attended.⁷⁸ In his *History of Civilization*, Guizot had described the principle of resistance as

⁷⁵ Tocqueville, *Democracy in America*, 1:403.

⁷⁶ Tocqueville, *Democracy in America*, 1.413.

⁷⁷ Tocqueville, *Democracy in America*, 1.360.

⁷⁸ On Tocqueville's relationship to Guizot, see Aurelian Craiutu, *Liberalism under Siege*, 87-122.

one of the legacies of the feudal system (as opposed to Rome or Christianity) to modern Europe, while celebrating the transition from “individual” to “legal” resistance that accompanied the progress of society.⁷⁹ Tocqueville’s treatment of aristocratic resistance appeared in his 1836 essay on the “Political and Social Condition of France,” which amounted to a comparative history of the state in Britain and France. Here he identified the increasing centralization of executive power in eighteenth-century France and the absence of a capacity for resistance as the major causes of what he called “administrative tyranny” and the state’s subsequent encroachment on the private sphere:

If this preponderant executive power is placed in the midst of a people among whom everything has already a natural tendency toward the centre, – where no citizen is in a condition to resist individually, – where numbers cannot legally combine their resistance, – and where all, having nearly the same habits and manners bend without difficulty to a common rule, – it is not easy to see what limits can be set to administrative tyranny, nor why (not content with directing the great interests of state) the agents of government may not at last assume to regulate the affairs of families.⁸⁰

Despite this, both in this essay and in *Democracy in America* Tocqueville was clear that aristocratic societies, including that of eighteenth-century France, possessed a capacity for resistance far exceeding that of democratic societies. In the 1836 essay he suggested that this was owing less to “institutions” than to “usages and manners” (*moeurs*) – a distinction familiar to any reader of Montesquieu.⁸¹ In *Democracy in America*, Tocqueville had in fact identified a variety of institutions – noble prerogatives; sovereign courts; corporations; provincial assemblies – which “while softening the blows of authority, maintained a spirit of

⁷⁹ François Guizot, *Cours d’histoire moderne: Histoire générale de la civilisation en Europe depuis la chute de l’empire romain jusqu’à la révolution française* (Brussels: Louis Hauman et Compagnie, 1835), 122-123.

⁸⁰ Alexis de Tocqueville, “Political and Social Condition of France”, *London and Westminster Review*, 3 & 25 (April 1836), 137-69, at 163. There is an interesting discussion of this essay in Harvey Mitchell, *Individual Choice and the Structures of History: Alexis de Tocqueville as historian reappraised* (Cambridge: CUP, 1996), 111-22.

⁸¹ Tocqueville, “Political and Social Condition of France”, 164-165. For Montesquieu’s clearest account of the distinction between laws and *moeurs*, see Montesquieu, *Spirit of the Laws*, 317.

resistance in the nation.”⁸² But here again he identified a kind of moral phenomenon, that of “aristocratic honor,” as the cause which “gave an extraordinary strength to individual resistance.”

Then you saw men who, despite their impotence, still maintained a high idea of their individual value, and dared to resist in isolation the exertion of public power.

But today, when all classes are merging together, when the individual disappears more and more in the crowd and is easily lost amid the common obscurity; today, when nothing any longer sustains man above himself, because monarchical honor has nearly lost its dominion without being replaced by virtue, who can say where the exigencies of power and the indulgencies of weakness would stop?⁸³

Tocqueville repeatedly emphasised the extraordinary power of aristocratic *moeurs* in fashioning a basis for resisting sovereign power. The despotic alternative to modern democracy would be characterised precisely by the absence of the “collective resistance” that had sustained the “old monarchy, moderated by mores.”⁸⁴ Or again: “What resistance is offered by mores that have already given way so many times?”⁸⁵ He made very similar points in the *Ancien Regime and the Revolution*, where he claimed that a combination of *moeurs*, customs and even abuses served to sustain the “spirit of resistance” against the centralizing projects of the *ancien régime* monarchy.⁸⁶ But he also implied that, beyond *moeurs*, there was something distinctive about the decentralised organisation of aristocratic societies that made them particularly equipped for resistance.⁸⁷ As he surmised in the 1840 volume, one of the reasons for this was the economic self-sufficiency of the aristocracy, and another was the deep isolation in which the citizens of democratic countries lived.⁸⁸ While it was “democratic governments that arrive most quickly at administrative centralization while losing their political liberty,” aristocracies “struggle an infinitely longer time, because the

⁸² Tocqueville, *Democracy in America*, I.506.

⁸³ Tocqueville, *Democracy in America*, I.508-509, n. As the manuscript notes to this passage reveal, this was a commentary on Montesquieu. (See I.509, n.)

⁸⁴ Tocqueville, *Democracy in America*, I.16, n.

⁸⁵ Tocqueville, *Democracy in America*, I.510.

⁸⁶ Alexis de Tocqueville, *The Ancien Régime and the Revolution*, ed. Jon Elster, trans. Arthur Goldhammer (Cambridge: CUP, 2011), 102.

⁸⁷ This theme is also explored in de Dijn, *French Political Thought*, 135-54.

⁸⁸ Tocqueville, *Democracy in America*, II.1268.

power of resistance is great in each of the parts of the social body organised in this way.”⁸⁹ This even had implications for war and military defence: aristocratic nations possessed “centres of resistance” that made them far harder to conquer than democratic countries.⁹⁰

Tocqueville thus adduced two diverging sources for the weakness of resistance in democratic societies. One of these was directly related to the politics of majority rule and majority tyranny, while another sprang from the social equality of conditions and the forms of societal isolation that left no barriers between individuals and the state. Two further features of Tocqueville’s account of resistance can be mentioned more briefly. One additional dimension of the problem was what we might term “intellectual resistance,” the capacity for opposing the soft despotism of public opinion and the creeping moral and intellectual conformity that Tocqueville associated especially with highly commercialised societies (such as the July Monarchy).⁹¹ As he remarked of the class of small property owners who amounted to the majority in many modern states, this class “empowers ideas and shapes mores (*moeurs*),” while it “makes its opinions, like its will, prevail everywhere, and even those who are most inclined to resist its commands end up letting themselves be led its examples.”⁹² And as he remarked in the context of a discussion of religion, “common opinion appears more and more as the first and most irresistible of all powers; outside of it there is no support strong enough to allow resistance to its blows for long.”⁹³ We might say that Tocqueville adjusted the meaning of resistance in the light of the new threats to individual liberty that derived from majority opinion and the oppressive weight of conventional *moeurs*. As he also noted in the 1840 volume, “the same men who from time to time overturn a throne and trample kings underfoot, bow more and more, without resistance, to the slightest will of a clerk.”⁹⁴

6. Tocqueville and the institutionalization of resistance

⁸⁹ Tocqueville, *Democracy in America*, I.164.

⁹⁰ Tocqueville, *Democracy in America*, I.1183.

⁹¹ For Tocqueville’s deeply critical perspective on the July Monarchy’s commercialised culture, see Tocqueville, *Recollections*, 4-6.

⁹² Tocqueville, *Democracy in America*, II.1037.

⁹³ Tocqueville, *Democracy in America*, II.752. For a major recent reinterpretation of the role of religion in Tocqueville’s thought see Alan Kahan, *Tocqueville, Democracy, and Religion: Checks and Balances for Democratic Souls* (Oxford: OUP, 2015).

⁹⁴ Tocqueville, *Democracy in America*, II.1243.

Although Tocqueville wrote admiringly about the capacity for “individual resistance” under the French monarchy, he was not advocating a revival of the forms of aristocratic resistance that distinguished the *ancien régime*. After all, in the 1836 essay he had clearly signalled the superiority of the “only just notion of liberty,” which was located in democracies, over the “aristocratic notion of liberty.”⁹⁵ The key challenge was not to find a route back to aristocratic institutions, but to identify alternative sources of resistance in the face of the modern democratic state’s tendency towards administrative centralisation and majority tyranny. But how could a viable form of resistance be rehabilitated in a society composed of isolated and enjoyment-seeking individuals? Despite his interest in *moeurs*, Tocqueville largely abandoned Constant’s call for a vigilant citizenry prepared to resist their representatives and instead put his faith in the construction of a differentiated system of social and political institutions that could supply a different kind of resistance to sovereign power. This aligned with his commitment to a form of Enlightened self-interest as opposed to more demanding and self-abnegating forms of civic virtue.⁹⁶

Once again, my aim here is not to point out previously unrecognised features of Tocqueville’s thought, but rather to stress how intimately some of the best known of these features were tied to the topic of resistance. This is especially true of his famous concept of association, which provided perhaps the most viable prospect for a revival of resistance in democratic ages. “Among democratic peoples,” Tocqueville declared, “it is only by association that the resistance of citizens to the central power can come about...”⁹⁷ Given that the principal reason for the failure of resistance in democracies lay in the isolation of citizens from each other, this identification of “association” as the cornerstone of resistance is unsurprising. Various forms of civic, municipal, industrial, and professional association could act as surrogate “aristocratic persons” in democratic ages, performing the most important task of the old aristocracy in opposing, contesting, and resisting sovereign power:

⁹⁵ Tocqueville, “Political and Social Condition of France,” 166.

⁹⁶ For a recent, persuasive argument that Tocqueville should be considered as a theorist of Enlightened self-interest rather than civic virtue see Jessica L. Kimpell, “Republican civic virtue, enlightened self-interest and Tocqueville”, *European Journal of Political Theory*, 14:3 (2015), 345-367.

⁹⁷ Tocqueville, *Democracy in America*, II.1238-1239.

I firmly believe that you cannot establish an aristocracy again in the world; but I think that simple citizens by associating together can constitute very wealthy, very influential, very strong beings, in a word aristocratic persons. [...]

In this manner several of the greatest advantages of aristocracy would be obtained, without its injustices or its dangers. A political, industrial, commercial, or even scientific or literary association is an enlightened and powerful citizen whom you cannot bend at will or oppress in the shadow, and who, by defending its particular rights against the demands of power, saves common liberties.⁹⁸

Resistance in this sense did not require any special degree of public virtue or patriotism on the part of associations, but simply a more limited willingness to protect its “particular rights.” But as the passage suggests, the (self-interested) commitment of associations to the defence of their particular rights contributed to the maintenance of collective freedoms.

Tocqueville’s second suggestion was to build “centres of resistance” into the structure of the constitution itself. As he added in a note to his chapter on the federal constitution, it was a question of neutralising the appeal to force by multiplying the “*legal* means of action and of resistance.”⁹⁹ Sceptics may charge that by this point the language of resistance has been emptied of its radical promise as a doctrine of extra-constitutional civic action. That argument can legitimately be made, but the more limited point here is that Tocqueville often had recourse to the vocabulary of resistance in his description of how modern democratic constitutions actually functioned. This is particularly visible in some of his accounts of how the executive, legislative, and judicial powers related to each other. Something of this comes through in his discussion of the courts or the judicial power, which he saw as an essential guarantee of rights and interests in democratic centuries.¹⁰⁰ In this sense he echoed Constant’s admiring account of the resistance offered by the courts under Charles I and Cromwell in England, and under Frederick II in Prussia.¹⁰¹ More interestingly, however, the executive was ascribed with a capacity to resist the legislature, whose domination Tocqueville identified as one of the inherent vices of republican states: the constitution thus “gave the President extensive prerogatives, and armed him with a veto, to resist the

⁹⁸ Tocqueville, *Democracy in America*, II.1269.

⁹⁹ Tocqueville, *Democracy in America*, I.231. Italics in original.

¹⁰⁰ Tocqueville, *Democracy in America*, II.1270.

¹⁰¹ See n. 59 above.

encroachments of the legislature.”¹⁰² This was relatively novel, although a similar preoccupation about the legislature’s potential for despotism can also be found in Thomas Jefferson, a key source for Tocqueville’s chapter on the “The Omnipotence of the Majority.”¹⁰³ It reflects a more nuanced understanding of the constitutional mechanics of resistance, in which the executive power not only required resisting but also had to resist in its turn.

The language of resistance also applied to the structure of the federal union itself, although here the position was more complicated. Historical examples of federal constitutions, Tocqueville argued, had failed to resolve the tension between power and resistance that characterised struggles between federal government and individual states. The outcome for the Dutch or the Swiss confederations had been the usurpation of a single powerful state (i.e. Holland) or the gradual dissolution of the union itself (i.e. Switzerland).¹⁰⁴ One advantage of the American system, and the feature that made it “stand out as a great discovery in the political science of today,” was that it had mitigated, without entirely neutralising, the capacity for state resistance to federal authority. This arose from the extension of the authority of federal power to individuals, and not just individual states. Tocqueville conceded that “the national spirit, collective passions, provincial prejudices of each state still strongly tend to diminish the extent of federal power so constituted, and to create centers of resistance to the will of the federal power.”¹⁰⁵ But the intricate design of the American system meant that the resistance of individual states to federal authority was now restricted to situations of extremity: “In America, each state has far fewer opportunities and temptations to resist; and if the thought occurs, the state can act on it only by openly violating the laws of the Union, by interrupting the ordinary course of justice, and by raising the standard of revolt. In a word, it must suddenly take an extreme position, something men hesitate to do for a long time.”¹⁰⁶ Again, there was something novel in this ascription of the language of resistance to the analysis of a federal political structure.

¹⁰² Tocqueville, *Democracy in America*, I.228, cf. I.203.

¹⁰³ On the weakness of the executive vis-à-vis the legislature, see Tocqueville, *Democracy in America*, I:404. On “elective despotism” in Jefferson see Thomas Jefferson, *Notes on Virginia*, Query XIII, in *Political Writings*, ed. Joyce Appleby and Terence Ball (Cambridge: CUP, 1999), 326.

¹⁰⁴ Tocqueville, *Democracy in America*, I.252-3.

¹⁰⁵ Tocqueville, *Democracy in America*, I.253.

¹⁰⁶ Tocqueville, *Democracy in America*, I.253.

7. Conclusion

The analysis developed here suggests that political ideas of resistance were significantly reshaped in the aftermath of the French Revolution, as theorists confronted the consequences of attempts to ground modern state authority on popular sovereignty or democratic foundations. Whereas a long tradition of early modern resistance theory had identified a more-or-less coherent “people” as the natural bearer of the right to resist, post-revolutionary theorists had to confront a more complex picture, characterised by the ostensible identity between the people and its representatives. The political and conceptual conundrum raised by this was to identify criteria for legitimately resisting governments which claimed to represent the people and to act in its name. Constant’s preoccupation with the politics of Napoleonic “usurpation” made him particularly sensitive to the manner in which a pathologically illiberal reading of popular sovereignty could be combined with an absolute prohibition on dissent. Tocqueville was more attuned to the problems of motivating resistance in democratic societies. While recognising the dangers of Napoleonic and plebiscitary corruptions of popular sovereignty in centralized polities, he identified a more novel problem in his discussion of how to resist the pressures of moral and intellectual conformism in a world based upon the equality of conditions. One upshot of *Democracy in America* was that the simultaneous expansion of commercial society and an exceedingly individualistic conception of democracy deprived traditional conceptions of resistance of their purchase.

Both Constant and Tocqueville implied that a genuinely representative political system must be able to house a “spirit of resistance” to sovereign power. But they offered contrasting responses to these dilemmas. It is sometimes suggested that Constant maintained a steady faith in the ability of the mechanisms of public opinion and commercial self-interest to frustrate the atavistic designs of authoritarian leaders.¹⁰⁷ Yet despite this, he continued to lay weight on the preparedness of modern citizens to resist governmental oppression and encroachment. In this respect, a robust willingness and capacity to engage in resistance, and thereby to defend a variety of rights, was a more significant guarantee of the “liberty of the

¹⁰⁷ See e.g. Fontana, *Benjamin Constant*, 40, 55, 88.

moderns” than is often recognised. Tocqueville, despite his emphasis on the power of *moeurs* in motivating resistance, reposed little faith in ideals of virtuous civic resistance, and instead focused more on the role of local associations and constitutional structures in constituting “centres of resistance” to sovereign power. Although Constant himself had travelled some distance in this direction in his emphasis on local patriotic connections, Tocqueville appears to have gone furthest in shifting the question of resistance away from the juridical language of rights and duties, and instead reframing it as a property of a distinctive set of societal and constitutional arrangements. On this view, resistance was no longer a matter of the popular exercise of a distinctive set of rights, but rather a result of an interlocking set of social and political institutions that prevented the domination of the political system by any single unitary power. As I remarked above, this effort to “institutionalise resistance” may appear to drain resistance of its radical promise as doctrine of extra-constitutional action, but for liberals of Tocqueville’s generation, that may have been part of the point.